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UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 OAKLAND DIVISION

MELITA MEYER, individually, and on
 behalf of all others similarly situated,

Plaintiff(s),

vs.

BEBE STORES, INC.,

Defendant(s).

Case No.: 14-CV-00267-YGR

CLASS ACTION

**MEMORANDUM OF POINTS AND
 AUTHORITIES IN SUPPORT OF
 BEBE STORES, INC.'S MOTION TO
 STRIKE AND MOTION FOR A
 MORE DEFINITE STATEMENT
 [F.R.C.P. RULE 12(E), (F)]**

Date: January 10, 2017
 Time: 2:00 P.M.
 Dept.: 1, 4th Floor
 Judge: Hon. Yvonne Gonzalez
 Rogers

Case No.: 14-CV-01968-YGR

SAMANTHA RODRIGUEZ, individually,
 and on behalf of all others similarly situated,

Plaintiff(s),

vs.

BEBE STORES, INC.,

Defendant(s).

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INTRODUCTION

On August 22, 2016, in its Order Granting in Part and Denying in Part Plaintiff's Motion for Class Certification, this Court certified a Post-October 16, 2013 clubbebe class ("Order") (Dkt. No. 106). The Order defines the "Post-October 16, 2013 Club Bebe Class" as follows:

All persons within the United States who provided their mobile telephone number to bebe in one of bebe's stores at the point-of-sale and were sent an SMS or text message from bebe during the period of time beginning October 16, 2013 and continuing until the date the Class is certified, who were members of Club bebe during the Class Period.

Id. p. 9:1-4 (emphasis added). The Order further provided that Plaintiffs' counsel "must present an amended complaint within sixty (60) days of this Order joining a proper class representative for the Post-October 16, 2013 Club bebe class. Otherwise, the Court will decertify the same." *Id.* p. 9:5-9.

Although Plaintiffs filed their First Amended Consolidated Complaint on October 21 (the "Amended Complaint") (Dkt. No. 112), Plaintiff Courtney Barrett ("Ms. Barrett") does not meet the criteria set forth in the Court's definition of the Post-October 16, 2013 Club Bebe Class. The Amended Complaint contends that Ms. Barrett received a single confirmatory, opt-in text message ("Opt-in Text") on or about December 12, 2013, but it is silent as to when Ms. Barrett provided her mobile telephone number to bebe. Plaintiffs' failure to establish that Ms. Barrett provided her mobile telephone number to bebe "during the period of time beginning October 16, 2013 and continuing until the date the Class is certified" renders the Amended Complaint deficient. Plaintiffs declined to amend the complaint to confirm when Ms. Barrett provided her mobile telephone number.

Given that the Court's Order expressly and unambiguously directed class counsel to "join[] a proper class representative for the Post-October 16, 2013 Club bebe class" within 60 days or the Court would decertify this subclass (Dkt. 106, p. 9:5-9), the appropriate remedy is to strike the allegations about Ms. Barrett, the Post-October 16, 2013 Club Bebe Class and all relief sought on behalf of this sub-class. Although bebe includes herewith its

1 Motion for a More Definite Statement, upon information and belief, Plaintiffs cannot
 2 amend their complaint to truthfully allege that Ms. Barrett provided her mobile phone
 3 number to bebe on or after October 16, 2013, as required to be a proper a proper class
 4 representative for the Post-October 16, 2013 Club Bebe Class.

5 I. STATEMENT OF FACTS

6 On August 22, 2016, this Court issued its Order on Plaintiffs' Motion for Class
 7 Certification after substantial briefing by the parties (Dkt. Nos. 83, 84, 86, 91, 103). See,
 8 generally, Dkt. No. 106. Plaintiffs moved to certify two nationwide subclasses:

9 **1. Post-January 16, 2010 ("Main Class")**

10 All persons within the United States who provided their mobile telephone
 11 number to bebe in one of bebe's stores at the POS and were sent an SMS or
 12 text message from bebe during the period of time beginning January 16,
 2010, and continuing until the date the Class is certified.

13 **2. Post-October 16, 2013 ("Subclass")**

14 All persons within the United States who provided their mobile telephone
 15 number to bebe in one of bebe's stores at the POS and were sent an SMS or
 text message from bebe during the period of time beginning October 16,
 2013 and continuing until the date the Class is certified.

16 Id. p. 4:4-12. This Court granted in part and denied in part Plaintiffs' motion and, in fact,
 17 rejected Plaintiffs' proposed subclass definitions (id. p. 4:4-12) and, instead, provided its
 18 own definitions for two subclasses (id. pp. 18:23-19:4) as follows:

19 **1. Post-October 16, 2013 Non-Club Bebe Class**

20 All persons within the United States who provided their mobile telephone
 21 number to bebe in one of bebe's stores at the point-of-sale and were sent an
 22 SMS or text message from bebe during the period of time beginning October
 16, 2013 and continuing until the date the Class is certified, who were not
 members of Club bebe during the Class Period.

23 **2. Post-October 16, 2013 Club Bebe Class**

24 All persons within the United States who provided their mobile telephone
 25 number to bebe in one of bebe's stores at the point-of-sale and were sent an
 26 SMS or text message from bebe during the period of time beginning October
 16, 2013 and continuing until the date the Class is certified, who were
 members of Club bebe during the Class Period.

27 Id. pp. 18:23-19:4. The Court's Order contemplates that Plaintiff Meyer will represent the
 28

1 “Post-October 16, 2013 Non-Club Bebe Class;” Plaintiff Rodriguez does not represent a
 2 class. *Id.* p. 18:16-18. Otherwise, the Court’s Order confirms that certification of the Post-
 3 October 16, 2013 Club Bebe Class “is conditioned on class counsel’s ability to find a
 4 proper representative for the class, who meets the class definition.” *Id.* p. 19:5-9. The Order
 5 expressly stated that class counsel were to present an amended complaint within 60 days or
 6 the Court would decertify the Post-October 16, 2013 Club Bebe Class. *Id.*

7 Plaintiffs filed their Amended Complaint adding Courtney Barrett as a plaintiff. The
 8 Amended Complaint is sparse with details regarding Ms. Barrett:

9 8. Plaintiff Courtney Barrett is currently a citizen and resident of the
 10 State of Georgia. However, at the time she signed up for Club Bebe and
 11 received the illegal text message she was a citizen and resident of the State
 12 of New Jersey. She is, and at all times mentioned herein was, a ‘person’ as
 13 defined by 47 U.S.C. § 153 (39).

12 ...

13 THE CALLS TO PLAINTIFF COURTNEY BARRETT

14 37. On information and belief, on or about December 12, 2013,
 15 Defendant sent Plaintiff Barrett an unsolicited and un-consented to text
 16 message.

17 38. On information and belief, Plaintiff Barrett had signed up for
 18 Club Bebe prior to Defendant’s sending of the December 12, 2013 text
 19 message.

20 The Amended Complaint is silent regarding when Ms. Barrett provided her mobile
 21 telephone number to bebe.

22 II. LEGAL STANDARDS

23 A. Legal Standard for Motions to Strike Pursuant to Federal Rule of Civil 24 Procedure 12(f)

25 Federal Rule of Civil Procedure 12(f) provides that a court may “[strike] from any
 26 pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous
 27 matter.” “Motions to strike are generally regarded with disfavor because of the limited
 28 importance of pleading in federal practice, and because they are often used as a delaying
 tactic.” Neilson v. Union Bank of Cal., N.A., 290 F.Supp.2d 1101, 1152 (C.D. Cal. 2003).
 “[C]ourts often require ‘a showing of prejudice by the moving party’ before granting the

requested relief.” *Id.* (citing Securities and Exchange Commission v. Sands, 902 F. Supp. 1149, 1166 (C.D.Cal.1995) (citations omitted)); see also Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure (“Wright & Miller”) § 1382 (1990). “Ultimately, whether to grant a motion to strike lies within the sound discretion of the district court.” *Id.* (citing Fantasy, Inc. v. Fogerty, 984 F.2d 1524, 1528 (9th Cir.1993) (court held that district court properly struck lengthy, stale and previously litigated factual allegations to streamline the action).

B. Legal Standard for Motions for a More Definite Statement Pursuant to Federal Rule of Civil Procedure 12(e)

Federal Rule of Civil Procedure 12(e) allows a party to move for a more definite statement before filing a responsive pleading where the original pleading “is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading.” Fed. R. Civ. P. 12(e). “Rule 12(e) motions are disfavored and rarely granted.” Castaneda v. Burger King Corp., 597 F.Supp.2d 1035, 1045 (N.D. Cal. 2009) (citing Cellars v. Pac. Coast Packaging, Inc., 189 F.R.D. 575, 578 (N.D. Cal. 1999)). A plaintiff is required to “set forth enough details so as to provide the defendant and the court with a fair idea of the basis of the complaint and the legal grounds claimed for recovery.” Self Directed Placement Corp. v. Control Data Corp., 908 F.2d 462, 466 (9th Cir. 1990).

III. ALLEGATIONS REGARDING MS. BARRETT SHOULD BE STRICKEN BECAUSE THE AMENDED COMPLAINT DOES NOT ESTABLISH THAT SHE IS A PROPER CLASS REPRESENTATIVE FOR THE POST-OCTOBER 16, 2013 CLUB BEBE CLASS, AS REQUIRED BY THE COURT’S ORDER

bebe acknowledges that motions to strike and for a more definite statement are generally disfavored. bebe contends, however, that unique circumstances exist here because Plaintiffs amended their complaint to add a representative for the Post-October 16, 2013 Club Bebe class at the direction of this Court. See Dkt. No. 106, p. 19:4-9. The Court’s direction to Class Counsel was specific: “Class counsel must present an amended complaint within sixty (60) days of this Order joining a proper class representative for the Post-October 16, 2013 Club bebe class.” *Id.* p. 19:6-8. Thus, the Amended Complaint does not

stand alone and, in the interest of averting wasteful litigation, whether Plaintiffs have established that Ms. Barrett is a proper class representative should be addressed now.

As required by the Court's Order, Plaintiffs' Amended Complaint fails to allege that Ms. Barrett is "a proper representative for the class, who meets the class definition" for the Post-October 16, 2013 Club Bebe Class. *Id.* p. 19:5-9. The Post-October 16, 2013 Club Bebe Class includes material subparts:

All persons within the United States who provided their mobile telephone number to bebe in one of bebe's stores at the point-of-sale and were sent an SMS or text message from bebe during the period of time beginning October 16, 2013 and continuing until the date the Class is certified, who were members of Club bebe during the Class Period.

Id. p. 19:1-4. When Ms. Barrett provided her mobile telephone number is material to the Court's Order (*id.* p. 19:1-4) and, in turn, to the issue of whether bebe had the requisite consent when the Opt-in Text was sent to Ms. Barrett (see, generally, In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Petitions for Wavier and/or Retroactive Waiver of 47 C.F.R. Section 64.1200(a)(2) Regarding the Commission's Prior Express Written Consent Requirement, CG Docket No. 02-278, Order (October 14, 2016); In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Declaratory Ruling And Order, ¶¶ 149-151 (July 10, 2015)).¹

Plaintiffs' Amended Complaint is sparse with details regarding Ms. Barrett. Even if she does not recall the precise date, Ms. Barrett should recall whether she provided her mobile telephone number when she enrolled in clubbebe and, for that matter, whether it was prior to October 16, 2013. Upon information and belief, Plaintiffs cannot amend their complaint to truthfully allege that Ms. Barrett provided her mobile phone number on or after October 16, 2013, as required for Ms. Barrett to be a proper class representative for the Post-October 16, 2013 Club Bebe Class.

¹ See Request or Judicial Notice in Support of Bebe Stores, Inc.'s Motion to Strike and Motion for a More Definite Statement Pursuant to F.R.C.P. Rule 12(F) and F.R.C.P. 12(E), Ex. A.

1 If Ms. Barrett is not a proper representative for the Post-October 16, 2013 Club
 2 Bebe Class, the appropriate remedy is to strike the allegations about Ms. Barrett, the Post-
 3 October 16, 2013 Club Bebe Class, and all relief sought on behalf of this sub-class. Rule
 4 12(f) would permit this Court to strike Plaintiff Barrett because, if she is not a proper
 5 representative, she has no “logical connection to the controversy at issue” and adding her at
 6 this date would be prejudicial to bebe if Plaintiffs intend that Ms. Barrett will represent a
 7 subclass that has not been certified by this Court. See Wright & Miller, § 1382; see also
 8 Fantasy, Inc. v. Fogerty, 984 F.2d 1524, 1527 (9th Cir.1993) (“The function of a 12(f)
 9 motion to strike is to avoid the expenditure of time and money that must arise from
 10 litigating spurious issues by dispensing with those issues prior to trial....”) (citing Sidney-
 11 Vinstein v. A.H. Robins Co., 697 F.2d 880, 885 (9th Cir.1983)), rev’d on other grounds by
 12 Fogerty v. Fantasy, Inc., 510 U.S. 517, 114 S. Ct. 1023 (1994).

13 This Court declined in its Order to certify Plaintiffs’ proposed pre-October 16, 2013
 14 “Main Class,” defined, supra, Section II, because “the varied scripts and instructions
 15 provided to different stores at different times as demonstrated by bebe’s evidence renders
 16 the question of consent not one that can be answered on a classwide basis because it would
 17 require an individual assessment of what each customer was told.” Dkt. No. 106, p. 10:18-
 18 21. By providing such limited allegations about Ms. Barrett, Plaintiffs are trying to
 19 circumvent the Court’s finding on this point and, otherwise, trying to avoid providing bebe
 20 with a basis to file a motion to dismiss challenging Ms. Barrett.

21 bebe believes that Plaintiffs intentionally failed to include allegations regarding
 22 when Ms. Barrett provided her mobile telephone number to bebe to frustrate bebe’s efforts
 23 to challenge Ms. Barrett and the Amended Complaint. Resolution of this issue is material
 24 because, if the Post-October 16, 2013 Club Bebe Class is decertified, it will simplify these
 25 proceedings because, among other things, it will significantly narrow the issues in any
 26 motions for summary judgment and reduce the burden on the parties of providing class
 27 notice.
 28

1 IV. ALLEGATIONS REGARDING MS. BARRETT ARE TOO VAGUE AND
 2 AMBIGUOUS TO CONFIRM THAT SHE IS A PROPER CLASS
 3 REPRESENTATIVE FOR THE POST-OCTOBER 16, 2013 CLUB BEBE CLASS,
 4 AS REQUIRED BY THE COURT’S ORDER

5 bebe acknowledges that motions for a more definite statement are also generally
 6 disfavored. As discussed, supra, Section III, bebe contends that unique circumstances exist
 7 here requiring an unusual approach to timely putting the issue of whether Ms. Barrett is a
 8 proper class representative before the Court for resolution. Federal Rule of Civil Procedure
 9 12(e) allows a party to move for a more definite statement where the pleading “is so vague
 10 or ambiguous that a party cannot reasonably be required to frame a responsive pleading.”
 11 Fed. R. Civ. P. 12(e). As discussed, supra, Section I, bebe cannot ascertain from the
 12 pleadings whether Ms. Barrett is “a proper representative for the class, who meets the class
 13 definition” for the Post-October 16, 2013 Club Bebe Class. Dkt. No. 106, p. 19:1-9.

14 By omitting any reference to when Ms. Barrett first provided her mobile telephone
 15 number to bebe, Plaintiffs have simply failed to establish that Ms. Barrett is a person “who
 16 provided [her] mobile telephone number to bebe in one of bebe’s stores at the point-of-sale
 17 ... during the period of time beginning October 16, 2013 and continuing until the date the
 18 Class is certified, who were members of Club bebe during the Class Period.” Id. p. 19:1-4.

19 Upon information and belief, Plaintiffs cannot amend their complaint to provide a
 20 more definite statement confirming that Ms. Barrett first provided her mobile phone
 21 number to bebe on or after October 16, 2013. Thus, Plaintiff should be required to establish
 22 that it would not be futile to order Plaintiffs to provide a more definite statement regarding
 23 when Ms. Barrett first provided her mobile phone number to bebe before granting them
 24 leave to amend their Amended Complaint. Leadsinger, Inc. v. BMG Music Publ’g, 512
 25 F.3d 522, 532 (9th Cir. 2008).

26 V. CONCLUSION

27 For this Motion, Plaintiffs’ Amended Complaint does not stand alone. This Court
 28 ordered Class Counsel to “present an amended complaint within sixty (60) days of this
 Order joining a proper class representative for the Post-October 16, 2013 Club bebe class”

1 or the Court would decertify this subclass. The Amended Complaint fails to establish that
2 Ms. Barrett “is a proper class representative for the Post-October 16, 2013 Club Bebe
3 Class” because it fails to identify when Ms. Barrett first provided her mobile telephone
4 number to bebe, as required by this Court’s definition for the Post-October 16, 2013 Club
5 Bebe Class. For this reason, bebe submits that the proper remedy is for the Court to grant
6 bebe’s motion to strike, striking all of the allegations about Ms. Barrett, the Post-October
7 16, 2013 Club Bebe Class, and all relief sought on behalf of this sub-class.

8
9 Dated: November 28, 2016

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11
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